United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6150

In The

United States Court of Appeals

For The Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

vs.

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES,
Defendants-Appellants,

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' and MASON BUILDERS ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS,
Defendants,

and

JOSEPH ERSKINE and LAWRENCE MORRISON,
Appellants.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York.

REPLY BRIEF FOR DEFENDANT-APPELLANT LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS

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1. Whether the statistical imbalance against Local 14 can be justified by the Local's reliance on proven job qualifications as a prerequisite to admission.

2. Whether the relief ordered by the lower court was inappropriate for the violations found.

3. Whether the remedial minority membership goal is significantly different from those previously utilized in this Circuit.

PRELIMINARY STATEMENT

Local 14 of the International Union of Operating Engineers submits this brief in reply to the answering brief of the Equal Employment Opportunity Commission served in the above entitled Title VII action on or about December 6, 1976.

POINT I

THE STATISTICAL IMBALANCE AGAINST LOCAL 14 CAN BE JUSTIFIED BY THE LOCAL'S RELIANCE ON PROVEN JOB QUALIFICATIONS AS A PREREQUISITE TO ADMISSION.

In response to Local 14's argument that the statistical disparity between the minority labor force in New York City and the minority composition of Local 14 can be explained by recourse to the underlying qualifications needed to operate heavy equipment within the City of New York, the EEOC asserts as a matter of fact that the job of operating engineer is staffed from a pool of inexperienced "groups", unlike other facets of the construction industry where "previous training and experience may be significant factors" (Appellee's Br., p. 27).

The EEOC reasons that since Local 15 draws its members primarily from inexperienced workers and Local 14 draws its members largely (almost 50 percent translates to "most" in appellee's brief and in the findings of the trial court) from Local 15, Local 14, therefore, draws from an inexperienced pool of labor (Appellee's Br., pp. 25-26). Accordingly, the minority labor force within the City of New York, 16 years of age and older with a high school education or less is the requisite comparable for Local 14 membership and the difference in minority ratio is attributable to discrimination.

The EEOC's utter failure to perceive the very nature of the trade which is the subject of this Title VII action is reflected in the judgment of the trial court. Neither the court nor the Government saw the need to educate themselves to the aspects of the construction industry as it affects and as it is affected by the operating engineer. Instead, after an "extensive" hearing most of which was spent in noting marginal corrections in the Government's proposed order, the court, with the aid of the Government, reworked an industry from scratch and usurped almost every aspect of union self-government.

Aside from references to individual instances of discrimination which find no support in the record, the EEOC asserts that in a trade that allegedly requires no qualifications, Local 14 failed to provide training for minorities adequate to qualify them for the position of operating engineer to the extent sufficient to pass a City test, which incidentally the municipality saw the need to interpose for this particular aspect of the construction industry, and to the extent necessary to satisfy the needs of the employers who, notwithstanding the EEOC's feelings with regard to these positions, would not entrust such expensive and dangerous equipment to unqualified "engineers" (Appellee's Br., pp. 19, 34).

Both the trial court and the EEOC, in their attempt to bootstrap Local 14, have ignored the employer who at all times relevant exercised total hiring discre ion. The employers demand that qualified operating engineers man this machinery (JA 274-279, Tr. 671, Tr. 786, Tr. 789). Insofar as Local 14 is concerned, qualifications cannot be read out of this case and certainly should not be disregarded on the basis of the EEOC's logic which attempts to ignore what little knowledge of industry practice is presented in the record in this action.

The fact that a man, having shown his entrance level qualifications by satisfying the objective criteria of a City test, chooses to specialize on any particular piece of machinery, or inadvertently fails to seasonally renew his license, the only remedy for which by statute is a $3.00 fine, says nothing about his ability to operate the machinery in the first instance. The only logical comparable to union minority membership in a skilled trade is the minority labor force possessing requisite skills, here, at the least, the ability to pass an objective business related test with regard to the machinery to be operated in the industry.

POINT II

THE RELIEF ORDERED BY THE LOWER COURT WAS INAPPROPRIATE FOR THE VIOLATIONS FOUND.

The EEOC argues that the court ordered referral system does not contravene any bona fide seniority or merit system (Appellee's Br., pp. 41-42). At the same time the EEOC argues that such a referral system is necessary to open up job opportunities which otherwise would continue to be monopolized by the present labor force which is predominantly white (Appellee's Br., pp. 38-39). The EEOC argues that this is not "bumping" but merely the act of filling future "vacancies" as they occur (Appellee's Br., p. 40).

It is respectfully submitted that when an employer chooses to continue employing a worker, white or black, because of proven competence, but is not allowed to do so by court order, that order contravenes a bona fife seniority or merit system. One cannot restrictively interpret "bumping" and broadly interpret "vacancies" to get around the stated purpose of the provision which is precisely to bump this identifiable group of operating engineers for the benefit of future minority members. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, rehearing en banc den, 531 F.2d 5 (2d Cir. 1975).

The EEOC similarly argues that the appointment of an Administrator has become commonplace in this Circuit (Appellee's Br., p. 43). A reading of the cases cited to support this proposition, however, makes clear the fact that the purpose of the Administrator was to negate the willful refusal on the part of the subject locals to conform to stated affirmative action relief. Equal Employment Opportunity Comm. v. Local 638, 532 F.2d 821 (2d Cir. 1976); Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622 (2d Cir. 1974); United States v. Wood Wire & Metal Lathers, Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971), aff'd 471 F.2d 408 (2d Cir. 1973). The EEOC opts for a test of "potential usefulness" in determining the propriety of the appointment of an Administrator (Appellee's Br., p. 44).* It is respectfully submitted that that is not the test in this Circuit. Equal Employment Opportunity Comm. v. Local 638, supra.).

The Administrator must effectively usurp much of the internal administrative powers of the Local which Congress has expressly stated should reside within the Union. 29 U.S.C. § 401. The Administrator clearly usurps much of the hiring

*One reason given for the need for an Administrator is the size of the Locals involved which number 8,000 members. This burden was imposed on the Locals by the court itself. Local 14 has a working membership of approximately 1, 100, no more than 30 percent of which looked to the Local for placement (Tr. 467, Tr. 587-588).

discretion of the employer. At a cost of $70.00 per hour with the ability to effectuate a bureaucractic maze at even more expense, resort to an Administrator should be a last resort. To appoint an Administrator on the facts of this case is nothing but punitive. If any modification of the order need be effected it is respectfully submitted that it is within the purview of this Court and not the Administrator to so modify.

POINT III

THE REMEDIAL MINORITY MEMBERSHIP GOAL IS SIGNIFICANTLY DIFFERENT FROM THOSE PREVIOUSLY UTILIZED IN THIS CIRCUIT.

The EEOC takes the position that the computation used in this case and those approved in prior cases (i.e. Steamfitters Local 638 and Sheetmetal Workers Local 28) are in accord (Appellee's Br., p. 45), but it fails to explain why there is a difference of 7 percentage points between this case and the Local 28 case where the identical geographical pool was used. The EEOC also fails to explain to the Court why the adjustments in the computations of a remedial goal approved in both the Local 638 case and in the Local 28 case are "unwarranted in light of the facts of this case" (Appellee's Br., p. 46).

While purporting to follow the most precise figures available, the EEOC is willing to ignore those changes which, they say, would "affect only marginally the final goal in this case" (Appellee's Br., p. 47) and which "produce[s] insignificant differences in the results" (Appellee's Br., p. 48). They are also willing "to ignore the educational

distribution among some of the unions' workers, and define the labor pool as those with a high school education or less" (Appellee's Br., p. 49).

When the EEOC does attempt to explain the difference between the goal reached in this case and in prior cases in this Circuit, it agrees with Local 14 that a "double count" computation should have been employed but asserts that the failure to use it is offset by the use of an "undercount" computation (Appellee's Br., p. 47, fn 43).* The use of a "double count" calculation would lower the percentage goal while the use of "undercount" would raise it. Here, the failure to account for "double count" resulted in an increase in the remedial goal. It is ludicrous to assert that this benefit to the EEOC is offset by the use of an undercount which also raises this goal. This double benefit cancels nothing but rather works exclusively to the advantage of the EEOC.

* A "double count" is an adjustment made by the court in the Local 638 and the Local 28 cases so that Spanish origin males who are also recorded in the census as black are not counted twice. See Local 638, supra 400 F.Supp, at 986 and Local 28, supra, 401 F. Supp, at 489, fn 29.

An "undercount" is an adjustment for omission in coverage of the decennial census. See Local 638, supra, 406 F. Supp, at 987.

The use of an "undercount", moreover, was disallowed by the court in the recent Local 28 case while used in the Local 638 case and in this case. Judge Werker refused to utilize this concept in the Local 28 case because any advantage the defendants derived would be counterbalanced by the advantage the EEOC would gain through the use of the more inclusive Spanish language data as a substitute for the unavailable Spanish surname data (401 F.Supp, at 493, fn. j). The courts apparently disagree with the EEOC's contention that a failure to take into consideration "undercount" would seriously distort the actual number of blacks in the labor force (Appellee's Br., p. 49).

With regard to the adjustment for the percentage of Spanish language population that is male, the court below, using plaintiff's formula, computed the figures derived only from Table 119 of the Department of Commerce publication General Social and Economic Characteristics 1970 Census of Population New York. The court in both the Local 638 and the Local 28 cases used Table 119 and Table 129 to reach the appropriate ratio. The 47.5 percent figure was a median figure with Table 129 giving actual figures on a borough to borough basis. Appellants agree that this variation is of a minor nature but when it is recognized that this variation is to be multiplied by another, namely the difference between "labor force" and "civilian labor force", it becomes clear

that together they no longer "produce insignificant differences in the results because of the tiny differences in the two figures" (Appellee's Br., p. 48). Once a figure for the Spanish language male population is reached it is used throughout the remaining portions of the overall formula to reach the percentage goal desired, so that a variation at the front of the formula will run throughout the whole length of the overall calculations, influencing each individual step.

The same logic applies to the willingness of the EEOC to exclude any calculation for those members of the Union that have completed more than a high school level of education. Again, the court in the Local 638 and the Local 28 cases made use of this factor while the trial court below did not. Th EEOC's position is that it is appropriate to "ignore the educational distribution among some of the unions' workers (Appellee's Br., p. 49). While it may seem appropriate to the EEOC to make this exclusion it certainly does not appear so to Local 14 and the Local 638 and Local 28 cases both support Local 14's position that a calculation for the total educational levels of the union should be considered.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the order and judgment of the court below be reversed in all respects, or alternatively that the order and judgment be modified to the extent sought herein, or alternatively that the matter be remanded for a hearing on relief, together with costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,

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A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

against

LOCAL 14, et al.,

Defendants-Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Velma N. Howe, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 298 Macon Street, Brooklyn, New York 11216. That on the **10th** *day of* **December** *19* **76** *deponent served the annexed*

Reply brief *upon* **see attached** *attorney(s) for*

the parties *in this action, at* **see attached**

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this **10th** *day of* **December** *19* **76**

Beth A Hirsh

BETH A. HIRSH
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